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Brf. of Laudley & Roller for P. E. (?)

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IN THE

Supreme Court of the United States.

JOHN E. ROLLER, Plaintiff in Error,

vs.

STEPHEN HOLLY, WILLIAM HOLLY, JOSEPH PEEPLES, ET ALS., Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

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I.

For concise statement of the case, See Printed Record, p. 33–36.

II.

For assignment of errors relied upon, See Printed Record, p. 37–38.

III.

For original brief of the argument for plaintiff in error, See Printed Record, p. 38–43.

IV.

The Texas Statutes, to which reference need be made in this case, are to be found in Sayles Texas Civil Statutes.

I. Article 1228 which provided at the time of the trial of the suit of McClintic & Proctor against

John E. Roller, that the time for service of process was five days, exclusive of the day of service and return day. As to this, there is no dispute between the parties before the Court.

II. Art. 1240, which reads thus:

"Where the defendant is absent from the State, or is a non-resident of the State, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of holding of the Court, naming such time and place. Its style shall be 'The State of Texas,' and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of Court impressed thereon; and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice."

III. Art. 1234, which reads thus:

"Where a defendant has been served with such notice he shall be required to appear and answer in the same manner, and under the same penalties as if he had been personally served with a citation within this State."

IV. Art. 1280, which reads thus:

"The fifth day of each term of the District Court and the third day of each term of the County Court are termed appearance days."

V. Art. 1281, which reads thus:

"It shall be the duty of the Court on appearance day of each term, or as soon thereafter as may be practicable, to call in their order all cases on the docket which are returnable in such term."

VI. Art. 1282, which reads thus:

"Upon the call of the appearance docket, or at

any time after appearance day, the plaintiff may take judgment by default against any defendant who has been duly served with process and who has not previously filed an answer."

VII. Art. 1340, which reads thus:

"Judgments for the foreclosure of mortgages and other liens shall be, that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid out of any other property of the defendant, as in case of ordinary executions."

V.

The Texas statutes, quoted above and in the brief, filed on behalf of the defendants in error, pages 3 and 5, show that there is no statute of the State of Texas, which provides directly and specifically for a suit for specific performance, or to foreclose a lien or mortgage as against non-resident, brought in *only* by service by publication or by constructive service outside of the State. The only statute cited by the plaintiff in error in this brief by defendants in error in their brief is a *mere general provision* for bringing in non-resident defendants IN ANY CASE *by publication.*

On page 8 of the brief for defendants in error it is admitted that the difference between the Texas statute, Art. 1230, quoted by them, and the Nebraska statute, which was the subject of consideration in the case of Arndt vs. Griggs, 134 U. S.,

p. 316, was that in the Texas statute, it is provided that in all actions of whatever character or form without describing them, except, of course, such actions as are not in rem or quasi in rem as in the case of Pennoyer vs. Neff, 95 U. S. R., p. 714, there may be service out of the State, while in the Nebraska statute *the particular actions* are described in which service by publication may be had.

But it is contended in said brief for defendants in error that while the Texas statute is general, and while it fails to describe the cases in which there may be constructive service, "yet *there is no argument or reason* for saying that there can be no constructive service in those cases, in which the Constitution of the United States and the 14th Amendment do not prohibit it."

It is submitted in reply that this contention is directly in opposition to the opinion of the Court, in the case of Arndt vs. Griggs, 134 U. S., p. 329.

In the opinion of the Court in that case, p. 329, it is distinctly held as it was in the case of Hart vs. Samson, 110th U. S., p. 155, that "*unless otherwise specially provided by statute*" the proceeding was in personam, and did not amount even to constructive notice to the non-resident and was a nullity. This opinion was in exact accordance, too, with the principles that were laid down long before in the well-settled case of Hollingsworth vs. Barber, 4th Peter, p. 474, already cited in full in the printed record, on page 40, "There is no seizure nor taking into the custody of the Court of the land so as to operate as constructive notice. Constructive notice can, therefore, only exist in the cases *coming fairly within the provisions of the statute authorizing the Court to make orders of publication* and *providing that the publication when made shall authorize the Court to decree.* It has been already

shown that this case is not within the provisions of ANY STATUTE."

But if further argument were needed to convince the Court that in the original proceeding of McClintic & Procter vs. John E. Roller, under which the defendants in error seek to shelter themselves, there was a personal judgment against the non-resident and a seizure and sale of property, claimed to be liable for said debt, *after such personal judgment had been rendered*, the Texas statutes quoted on pages 4 and 5 of the brief will suffice.

Art. 1340, page 4, declares that the judgment against the defendant "shall be that the plaintiff recover his debt, damages, and costs; that there be a foreclosure of the plaintiff's lien on property subject thereto, and that an order of sale shall issue to an officer of the county directing him to seize and sell the same under execution," and "if the same cannot be found or the proceeds of sale be insufficient to satisfy the judgment then to make the money remaining unpaid out of any other property of the defendant, as in ordinary executions."

If to the plain language of these statutes themselves there be added the opinion of the Supreme Court of the State of Texas in the case of Savage vs. Fairman, 54th Texas, p. 601, in which it was held that the only effect of the suit in which the first vendee alone was made a party and in which he was served with process *in person, in the State*, while the subsequent vendees claiming under him, who were in possession of the land, were not made parties, was to obtain a *personal judgment against the first vendee alone*, can there be a further doubt as to the fact that only *a personal judgment* was obtained against John E. Roller, the only defendant in the McClintic & Proctor suit?

Can there be any doubt about the *fact*, when

it is one of the facts agreed, that a judgment by default was rendered against him, he being the sole defendant? P. 10, Printed Record.

Can there be any doubt about the fact that it was after this judgment was rendered that an order of sale was issued, directing the sheriff to "seize and sell the same, under execution, in satisfaction of the judgment, and if the property cannot be found or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in the case of ordinary executions," and that under this order the land was *seized*, for the first time in the whole proceeding, and that the same was advertised and sold, and can there be any doubt that under the words of the statute of the State of Texas, Art. 1340, the sheriff was directed by the order of sale, in the event of loss of the property or deficiency in the sale, to make the money or any balance remaining unpaid out of any other property of the defendant?

Can there be any doubt, too, not only that this was a personal judgment by default against the sole defendant, John E. Roller, but that if it was merely a decree for specific performance or enforcing a vendor's lien, that there was no special statute in the State of Texas which provided for such a proceeding in such a case against non-residents, but only a general statute allowing service of process on such non-resident? Can there be any doubt about the fact that there was no seizure of the land, but that under a personal judgment rendered against the first vendee the land was SUBSEQUENTLY seized and sold?

Must not this Court say as it said in the case of Hollingsworth vs. Barber, 4th Peters, p. 474:

"The law regards the seizure of the thing as constructive notice to the whole world, and all

persons concerned in interest are considered as affected by this constructive notice; but if these cases do form an exception, the exception is confined to the class already noticed, where the proceeding is strictly in rem, and in which the thing condemned is FIRST SEIZED AND TAKEN INTO THE CUSTODY OF THE COURT. The case under consideration is not properly a proceeding in rem, and a decree in chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principle of a proceeding in rem, so far as to dispense with the service of process on the party. There is no seizure nor taking into the custody of the Court of the land so as to operate as constructive notice. *Constructive notice* can, therefore, *only exist in the cases coming* fairly *within the provisions of the statute* authorizing the Court to make orders of publication and providing that the publication, when made, shall authorize the Court to decree. It has been already shown that this case is not within the provisions of any statute."

These doctrines are repeated in substance both in the decision in Hart vs. Samson, 110th U. S., p. 131, and in that in Arndt vs. Griggs, 134th U. S., p. 329.

Surely these considerations are decisive of the case before the Court.

Nor can it be argued that although the sole defendant John E. Roller was not brought personally within the jurisdiction of the Court, and therefore not bound personally by the judgment rendered against him, yet that the land might be and was bound.

In some of the later cases, while the doctrine of the necessity of the seizure under the process of the Court to give the Court jurisdiction of the *res* is still insisted upon, yet it is also said that jurisdiction may be also acquired by acts of equivalent import which stand for and represent the dominion of

the Court over the thing and in effect subject it to the control of the Court.

The opinion of the Court in Cooper vs. Reynolds, 10th Wallace Rep., p. 112, is still the law of the land.

In that case it is said:

"The power to render the decree or judgment which the Court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it *by law* in regard to the subject matter of the cause."

It is to be observed that in reference to jurisdiction of the person, *the statutes of the States* have provided for several kinds of service of original process short of actual service on the party to be brought before the Court, and the nature and effect of this service, and the purpose which it answers depends altogether *upon the effect given it by the statute.* So also while the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by the officer of the Court, such jurisdiction may be acquired by acts, which are of equivalent import, and which stand for and represent the dominion of the Court over the thing, and in effect subject it to the control of the Court. Among this latter class is the LEVY *of a writ of attachment* or SEIZURE *of real estate*, which being incapable of removal and lying within the territorial jurisdiction of the Court by the officer's levy of the writ and return of that fact to the Court."

In the case of Mankin vs. Chandler & Co., 2nd Broekenbrough Reports, p. 130, Chief Justice Marshall quotes from the English case of McDaniel v. Hughes, 3 East, 367, in which it was contended "that three parties are necessary to form an attachment—the plaintiff, the defendant, and the garnishee. The plaintiff must prove his debt, the defendant must have due notice of the process against him, and *the garnishee must be in actual*

possession of the defendant's property which is to be attached," and this contention, he says, was not controverted. It was because the person who claimed the property was a party of the suit, that the Court was authorized to pronounce judgment in the case.

"It is presumable," says Chief Justice Marshal, "that the person whose property is seized, is either himself attentive to it or has placed it in care of some person who has the power and whose duty it is to represent him and assert his claims."

It is submitted that in no case to be found anywhere was it ever said that a suit instituted against a non-resident alone, which ignored the fact that the land against which proceedings were being taken had been sold by him and was in possession of his vendees, without making them parties to the suit and without any seizure of the land until after a personal judgment had been rendered against a non-resident defendant and an order of seizure and sale had issued was such "open and public exercise of dominion over the land for the purposes of the suit as to be equivalent to a seizure."

It is submitted that it was nothing more or less than an absolute failure to make such seizure or to exercise any dominion whatever over the land or those in possession of it, except upon a void personal judgment against a non-resident.

Nor will the argument avail, that in the suit of McClintic & Procter vs. John E. Roller all the title of Jordan and wife and all the title of John E. Roller, "*whatever he had*," were foreclosed and ordered to be sold, and that the same was sold at sheriff's sale, when Williams bought for himself and Jackson, and that this sale conveyed to them a good and valid title.

This is the contention of the defendants in error, but it is exactly the opposite of the doctrine

laid down in the opinion of this Court, in the case of Freeman vs. Alderson, 119 U. S., p. 187, already cited—pages 41 and 42 of the Printed Record. There the Court said that "actions, *quasi in rem* differ among other things, from actions which are strictly IN REM, in that the interest of *the defendant is alone sought* to be affected, that citation to him is required, and that judgment therein is only conclusive *between the parties.*"

The Supreme Court of Texas held the same thing in the case of Savage vs. Fairman, 53 Texas, p. 601, as already quoted.

Now it is a fact agreed that at the time of the institution of the McClintic & Procter suit John E. Roller, who was the sole defendant in the first suit, had sold and conveyed all interest in the land to the Hollys, and the only interest he had in the matter was in $1,140.00 purchase money due him from them. The defendants in error say that Roller's interest, "whatever he had," was sold. This expression practically admits that Roller had no interest in the land. *If he had no interest in the land*, and the proceeding could only affect his interest, "whatever he had," the sale and the seizure of the land under a personal judgment against him and the sale of the same to Williams and Jackson could be nothing more than a nullity, and could carry no title of the land from Roller, who was the only defendant before the Court, to Williams or anybody else.

The defect in the proceeding was that there was NO SEIZURE *of the land as defendant's property* at the commencement of the action, nor was there any service of process upon the Hollys, who were in possession of the land and indebted to Roller in more than four times the amount which he owed to McClintic & Procter, so as to garnishee the money in their hands and divest them of their title to the property if they failed *to pay* the debt for Roller, or

to protect them from double payment if they did pay.

The result has been to deprive the plaintiff in error here, John E. Roller, upon a mere constructive notice to him, of the purchase money due him from his vendees, the Hollys, and to deprive the Hollys, without any notice in the suit to them whatever, of the land itself, and in thus depriving them of the land, deprive the said Roller also of the only security which he had for his unpaid purchase money.

Surely such a judgment or decree of the State of Texas in such a proceeding against a non-resident unauthorized and unsupported by any statute of the State was not obtained by "due process of law."

VI.

The argument is seriously made for the defendants in error—page 11—that because the plaintiff in error, John E. Roller, was not proceeded against by publication, but was personally served in Virginia with the citation and a copy of McClintic & Procter's petition, that fact makes a difference in their favor.

It is well settled that a personal service upon a non-resident outside of the limits of the State has no greater or other effect than if he had been proceeded against by order of publication. There is surely no need to cite authorities in support of this proposition.

VII.

But in addition the agreed statement of facts —page 10—shows that the said Roller was served with the said notice and petition in the State of Virginia on the 30th day of December, 1890, notifying him to appear on January 5th, 1891, at Groesbeck, Texas, and that it required four days

from the date of the service of the said notice for a letter to go by mail from Harrisonburg, Va., the place of service, to Groesbeck, Texas.

Under the Texas statute you must exclude both the day of service and the return day. If a letter had started then from the place of service, or the plaintiff in error had gone in person, it would have required all of the four days, including the 3d of January, 1891, in which to reach his destination, leaving him but one day, and that day a Sunday, in which to prepare his defence The four days required for a letter or for the defendant himself to reach the place of trial expired on the 3d of January, 1891, and then came Sunday, the 4th, followed by Monday, the 5th, the first day of Court. Was this reasonable or adequate notice of the suit? Did it reach the plaintiff in error in time to enable him, even if he abandoned all other business, to defend the action? The State of Texas has herself answered the question as to the reasonableness of such a notice by since changing the time of notice, making it ten days under its new statute instead of five.

Independent of that significant fact, it is submitted with confidence that there cannot be found a case in jurisprudence in which it is held that one day's notice, even if it was not a Sunday, of a suit was either reasonable or adequate, and gave the defendant time within which to defend the action brought against him.

It is not believed this Court will so hold.

At common law it is said:

"With respect to the mode of service there is an obvious analogy between mesne process in an action and process in other cases, and some principles may be extracted from the decisions respecting the service of a summons to answer an information before a justice of the peace. In general there *must*

be personal service, or the summons actually come to the parties in possession in a *reasonable time* before the hearing, so as to enable him without OMISSIS OMNIBUS ALIIS NEGOTIIS to appear, or the justice should not proceed, but issue a fresh summons."

See 3d Chitty's General Practice, p. 144, also 2d Chitty's General Practice, p. 176.

On page 176 it is said: "A man ought not to be required *omissis omnibus aliis negotiis* to answer on THE SAME OR EVEN THE *next day*, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence and even the convenience of his witnesses should be considered, and therefore, in general, SEVERAL DAYS should intervene between the time of summons and the hearing. In the superior courts, in general, at least eight days of notice, inquiry and of trial are essential for the preparation of the defence."

In the 3d Blackstone's Commentaries, p. 357, it is said: "In case the plaintiff intends to try the cause he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of trial; and if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise."

It has been objected in commenting on 20th General Rule of Hilary, Term 4, W. 4, that "FORTY-EIGHT HOURS would appear to be in most cases TOO SHORT A PERIOD within which a party should give his assent or dissent to the admission of instruments in evidence." See 3d Chitty's General Practice, p. 112.

Where the summons was to appear on the SAME DAY the Court held it EXTREMELY UNREASONABLE. See 2d Chitty's General Practice, p. 176.

Tested by these principles, surely the ONE DAY, and that a Sunday, in this case, which it is admitted by defendants in error here in their brief, was all the time the defendant had in the cause within which to prepare his defence, was unreasonable and

the statute which provided for such a notice did not provide for "due process of law."

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